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90-1270

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF ALABAMA, Petitioner

v.

RAYMOND E. BROWN, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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STATEMENT OF THE FACTS

Raymond Eugene Brown, respondent, was accused of the murders of Linda LeMonte and Sheila Smoke shortly after their bodies were discovered on August 9, 1987 near Montgomery, Alabama. Mr. Brown had recently been released on parole from a state prison in Alabama for a prior murder conviction that was charged against him when he was fourteen years old. The deaths of Linda LeMonte and Sheila Smoke, and the pursuit and apprehension of Mr. Brown received extraordinary media coverage in the Montgomery, Alabama area. Defense exhibits establish that the manhunt for Mr. Brown had residents "bolting their doors and taking up arms" and was described as one of the largest in Alabama's history.

At least eight law enforcement agencies, tracking bloodhounds, helicopters and even speedboats were employed in the initial investigation.[1] Mr. Brown was consistently described by police officers in news accounts as "extremely dangerous,"[2] "a

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1. References to media accounts are specific to the report source in the Montgomery area. All media reports are contained in 53 defense exhibits admitted at trial during pre-trial proceedings.

2. (*Montgomery Advertiser*, A1, 8/12/87, "Police Hunt for Suspect in Slayings"; WKAB, TV32, 8/ 11/87; WLWI Radio, 8/11/87, 8/12/87; WSFA, TV12, 8/11/87; Action 8 TV, 8/11/87, 8/12/87; UPI, 8/11/87; Defense Exh.16, Radio Broadcast, 8/12/87, Motion for Change of Venue; Defense Exh.__, Radio Broadcast, 8/11/87, Motion for Change of Venue).

psychopathic killer"[3] and someone "who kills for the pleasure of it." (Defense Exh.__, Radio Broadcast, 8/11/87, 8/13/87, Motion for Change of Venue).

Montgomery County deputy district attorney Ellen Brooks' personal opinions about the case were frequently quot in local media. Ms. Brooks was quoted in the newspapers as saying that Mr. Brown was responsible for "one of the most graphically horrible cases we've had since I've been a district attorney", (*Montgomery Advertiser*, A1, 8/14/87, "Friends, Family Mourn Victims") and additionally stated that "if any case called for the electric chair Brown's does." (Defense Exh.__, Radio Broadcast, 8/14/87, Motion for Change of Venue). Descriptions of the killings and crime scene were consistently graphic, detailed, and inflammatory in tone.

After Mr. Brown's arrest, several newspapers and electronic media incorrectly reported that Mr. Brown had admitted committing the murders by waiving a parole revocation hearing. (*Montgomery Advertiser*, D1, 9/9/87, "Convicted Triple-Murderer Faces 4 New Capital Charges"; *Montgomery Advertiser*, C1, 11/17/87, "Officer: Brown Admitted Killings"; WSFA, TV12, 8/17/ 87, 9/8/87; UPI, 8/18/87). Mr. Brown's parole officer told the press that he had no doubt that Mr. Brown was confessing to the murders by signing the hearing waiver, that Brown had said he "did it", and that

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3. (WKAB, TV32, 8/11/87; WLWI Radio, 8/11/87; WSFA, TV12, 8/11/87, 8/12/87; UPI, 8/11/87; Defense Exh.16, Radio Broadcast, 8/11/87, Motion for Change of Venue; Defense Exh.__, Radio Broadcast, 8/11/87, 8/12/87, Motion for Change of Venue).

Brown had given a statement to the police.[4] Deputy district attorney Ellen Brooks also misleadingly informed the press that Brown had confessed to the murders (Action 8 News, 5:30 p.m., 8/18/87; WACV NewsRadio, 8/18/87, 7 a.m.; WSFA, TV12, 8/17/87, 9/8/87).

Even before Mr. Brown's arrest, every article and broadcast about this case made mention of the fact that Mr. Brown had previously been convicted of the murder in 1960 when he was 14 years old. Some articles said the 1960 killings were "identical" to the present murders. Some referred to Mr. Brown as "Blade Brown" and "the boy-killer" and reported that he had made threats against many people in his home town of Ashland where "fear of another bloodbath lives." (*Montgomery Advertiser*, A1, 8/12/87, "Double-Murder Suspect Has Violent History"; see also, WSFA, TV12, 8/12/87). Prosecuting attorney Ellen Brooks was quoted as saying Brown should have been given the death penalty in 1960. (WLWI Radio, 8/14/87, 6:40 a.m., 8:40 a.m.).

The fact that Mr. Brown was on parole at the time of the present offense received extraordinary attention and occasioned strong criticism of the parole board from a local organization calling itself Victims of Crime and Leniency (VOCAL), Montgomery Chief of Police John Wilson, and the editorial boards of several newspapers (*Montgomery Advertiser*, B1, 8/23/87, "A New Chairman

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4. (*Montgomery Advertiser*, 11/17/87, C1, "Officer: Brown Admitted Killings"; *Alabama Journal*, 11/16/87, "Attorneys Want Brown's Words Excluded in Trial"; WKAB, TV32, 11/16/87).

Gets an Old Problem"; *Montgomery Independent*, 4, 8/20/87, "Eyes on the Parole Board"). Pete Mathews, Mr. Brown's defense attorney in his previous murder trial, said "I would have told [the parole board] not to release him. I know facts that lead me to believe if released he would do it again."[5]

As a result of Mr. Brown's case, a grand jury investigation was instigated into whether the parole board was too lenient when it granted Mr. Brown parole. This investigation also received extensive publicity and coverage. (*See e.g.*, *Montgomery Advertiser*, D2, 10/14/87, "Parole Board Law Under Grand Jury Scrutiny"). Most news stories reported that people who get sent to prison quickly get paroled and that many parolees pose a threat of violence (*See e.g.*, WSFA, TV12, 11/2/87, 11/4/87). Parole board member John Porter responded to criticism about his role in releasing Brown by saying, "[t]he public wants guarantees. The terrible fact is there are no guarantees short of the electric chair." (*Montgomery Advertiser*, G1, 9/6/87, "Victims Rights Advocates Question Parole Process").

An indication of the extraordinary notoriety of this case is its inclusion in the *Montgomery Advertiser's* year-end survey of the issues that had dominated 1987. (*Montgomery Advertiser*, A1, 12/26/87, "Politics, Crime, Health Issues Dominate 1987").

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5. (*Montgomery Advertiser*, A1, 8/13/87, "Brown's Ex-Attorney Knew Parole Was Questionable"; WACV NewsRadio, 8/13/87, 8 a.m., 10:36 a.m., 11 a.m., 11:30 a.m., 12:06 p.m.; WSFA, TV12, 8/13/87).

Before jury selection began in this case dozens of news accounts, reports, editorials, statements and comments by criminal justice system officials had shaped strong community sentiment against Mr. Brown through the local media. Many of the news reports were very inflammatory, most assumed Mr. Brown's guilt and a significant number prejudged that a death sentence should be imposed.

Trial counsel for Mr. Brown sought a change of venue from Montgomery County prior to trial due to the extensive pre-trial publicity in the Montgomery area. Despite the 53 exhibits submitted by Mr. Brown documenting this highly prejudicial publicity, the trial court denied Mr. Brown's motion for change of venue stating that prejudice could not be presumed at that time and that the best way to demonstrate actual jury prejudice would be by extensive and thorough voir dire. Brown v. State, __ So.2d __, 3 Div. 964, slip op. at 7 (Ala.Crim.App. 1990).[6]

During voir dire, 42 members of the 66 member panel (63%) admitted to having heard or read some of the pretrial publicity about Mr. Brown's case. (R. 94). Trial counsel made repeated motions for individual voir dire to explore the extent and nature of the prejudice resulting from the pretrial publicity which were all denied by the trial court. Brown at 4-8. Instead, the court merely asked individual jurors to stand if, as a result of what they had heard in the press, they did not think they could be

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6. The judge did issue a gag order to prevent attorneys from commenting about the case to the press. Brown at 16.

impartial and render a verdict based solely on the evidence presented in court. (R. 97-99). No jurors stood. (R. 97-99).

The defense again requested individual voir dire veniremembers and was again denied permission individually examine potential jurors by the trial judge. The trial court simply repeated its question. (R. 111-112). Finally, two jurors stood and admitted that they did not think they could be impartial based on what they'd read and opinions they had formed and both were excused for cause. Brown at 8.

Most of what was reported in the press and pre-trial coverage of this case was clearly inadmissible at Mr. Brown's trial and highly inflammatory in tone. Personal opinions about Mr. Brown's guilt, the propriety of the death penalty, other crimes accusations, incorrect reports about admissions and other statements were clearly not something that a juror could constitutionally carry into the jury before trial began. The Court of Criminal Appeals readily found that there was a "significant possibility of prejudice" as a result of the pretrial publicity surrounding this case. Brown v. State, __ So.2d ___, 3 Div. 964, Slip Op. at 12 (Ala. Crim. App. 1990).

The Court of Criminal Appeals further found that the trial court's general and conclusory questions of the jury panel *en masse* did not provide any basis upon which the court could properly base its required finding that the jurors' impartiality had not been destroyed by exposure to pretrial publicity. Brown at 18. Based on the record and the particularly sensitive scrutiny

required in capital cases, the Court of Criminal Appeals held that the limited voir dire in Mr. Brown's case violated his rights to due process under the Fourteenth Amendment and the Sixth Amendment right to a fair trial by an impartial jury. Brown at 18.

REASONS FOR DENYING REVIEW

A. Where Settled Law is Properly Applied to Case Specific Facts, This Court Should Not Exercise Certiorari Review

The State of Alabama's application for certiorari should be denied because it presents no important issue or question of law for review by this Court. Respondent's conviction and death sentence were overturned because the trial judge below failed to make an adequate inquiry into whether extraordinary pre-trial publicity and media coverage undermined jurors' ability to fairly try the accused. There is no conflict among lower courts that where there is evidence that venirepersons have been exposed to prejudicial and biased media accounts and reports against an accused, trial courts must take steps to ensure that jurors are impartial, can apply a presumption of correctness and convict based solely on the evidence.

Although 63 percent of the jury venire openly admitted exposure to extremely prejudicial and false information about Respondent's case, the trial court restricted inquiry into the scope of prejudice and each juror's ability to fairly adjudicate Respon-

dent's guilt or innocence. The law on this issue is settled, a trial judge must reliably establish that a capital defendant will not be tried by a jury that has been tainted with inadmissible hearsay and press reports which are extremely prejudicial.

Moreover, the decision below rests independently on state law grounds as well as federal authority and consequently should not be reviewed by this Court. The appellate courts of Alabama have held that as a matter of state law the prejudicial effects of extreme pre-trial publicity must be controlled in a criminal case. Waldrop v. State, 462 So.2d 1021 (Ala.Cr.App. 1984). The Alabama courts have adopted the view that under state law "the usual and best method for demonstrating actual jury prejudice is by an extensive and thorough voir dire examination. Brown, 571 So.2d at 352, *quoting,I* Arthur v. State, 472 So.2d 650 (Ala. 1984), *rev'd*, 472 So.2d 665 (Ala. 1985).

The Petitioner's claim that some of the allegedly prejudicial information was ultimately admitted at trial in no way justifies the trial court's failure to make sure that trial jurors would not convict Mr. Brown based on pre-trial rumors, media speculation or community bias. It would wholly unjust to allow an accused to be tried by a jury saturated with presumptions of guilt, pre-trial bias and animosity toward the accused by concluding that the defendant's efforts to contain or confront pre-trial bias somehow makes the partiality of jurors permissible.

The facts surrounding this case are additionally unique in that they reveal an unparalleled media focus on the accused that

was exceptionally inflammatory and potentially prejudicial. For these reasons and the reasons below, this Court should deny the petition for certiorari filed by the State of Alabama.

B. This Court's Clearly Established Constitutional Guidelines Dictate the Lower Court's Decision.

It is axiomatic that the constitutional guarantee of fair trial by an impartial jury requires that jurors not come into the trial proceedings with opinions or beliefs about the defendant's guilt which have been improperly shaped or formed by pretrial publicity. A juror must render a verdict based solely on the evidence presented in court. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Spies v. Illinois, 123 U.S. 131 (1887); Holt v. United States, 218 U.S. 245 (1910); Reynolds v. United States, 98 U.S. 145 (1878). The Supreme Court has recognized that "[t]he life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media . . . due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial." Estes v. Texas, 381 U.S. 532, 540 (1965).

The United States Constitution and the State Constitution of Alabama assures to every person accused of a criminal offense a presumption of innocence. The Supreme Court has acknowledged that the most priceless safeguard of individual liberty and dignity is the Sixth Amendment right to trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717, 721 (1961).

> In essence, the right to jury trial guarantees to the accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . .In the language of Lord Coke, a juror must be "indifferent as he stands unsworne." Co Litt 155b. . . .This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 (1878).

Irvin at 722.

The Court has acknowledged that due process requires "that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). This Court has long recognized that

> [v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled [citations omitted]. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges. . . .

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

Whether or not a juror is impartial is a mixed question of law and fact and should be tried, as far as the facts are concerned, like any other issue of that character, upon evidence. Reynolds v. United States, 98 U.S. 145 (1878). Voir dire examination is the process by which both the court and attorneys obtain the objective information necessary to assess juror qualification. Unless jurors are asked specifically about what they read and what their reactions to the publicity were, the trial court has no basis upon which to make its findings of juror qualification.

At one time, it was thought sufficient for a juror to simply give a general assurance that she or he could lay aside her opinions and decide the case solely on the evidence. Aldridge v. United States, 283 U.S. 313, n.3 (1930). However, courts now recognize that jurors may hold biases of which they themselves are unaware but which nonetheless disqualify them from impartially sitting on a case. As a result, "the juror's assurances that he is equal to [his] task cannot be dispositive of the accused's rights," Murphy v. Florida, 421 U.S. 794, 800 (1975). It is therefore crucial that an informed *judicial* determination of impartiality be made.

In order to determine whether a juror can in fact uphold his duty to impartially decide a case based only on the evidence presented in court, the trial court must ascertain what materials and information a juror has been exposed to and assess what the result of that exposure has been. Individual sequestered voir

dire is often, in fact, the only adequate method by which this can be accomplished without simultaneously tainting all other potential jurors.

In concluding that Mr. Brown's rights to a fair trial were violated, the Court below followed well established constitutional guidelines, state law and recognized extraordinary evidence of pre-trial bias and prejudice against the accused. The decision of the Court below should therefore not be reviewed by this Court and the State's application for certiorari should be denied.

CONCLUSION

The State's application for certiorari review should be denied.

Respectfully submitted,

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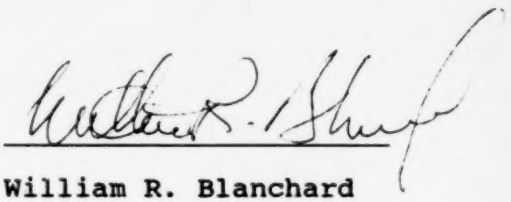
CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served on counsel for the petitioner, William D. Little at the Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130, this 12th day of March, 1991 by first class United States mail, postage pre-paid.



William R. Blanchard